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No. 92-355

In the Supreme Court of the United States

OCTOBER TERM, 1992

MIDCO PIPE & TUBE, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the participation of a pipe fabricator in a bid-rigging conspiracy among competing pipe distributors precludes application of the per se prohibition against price fixing among competitors under Section 1 of the Sherman Act, 15 U.S.C. 1.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A29) is reported at 962 F.2d 465.

JURISDICTION

The judgment of the court of appeals was entered on May 28, 1992. The petition for a writ of certiorari was filed on August 25, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner is a distributor of specialty pipe. After a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of conspiring with a pipe fabricator and other pipe distributors to fix prices of specialty pipe, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. Pet. App. A2, A5. Petitioner was fined $250,000 and, as a condition of probation, was held jointly and severally liable with two other corporate defendants to pay restitution in the amount of $859,935 to the victims of the conspiracy. Pet. App. B2. The court of appeals affirmed. *Id.* at A1-A29.

Specialty pipe is employed in industrial applications to convey high-temperature, low-temperature, or corrosive fluids. The end users—typically oil refineries, power plants, and chemical companies—usually contract with a pipe fabricator to obtain, shape, and weld the pipe to fit the configurations of a particular project. The contracts normally direct the fabricator to purchase the pipe on a "cost-plus" basis, meaning that the fabricator buys the pipe from a specialty pipe distributor and charges the end user the distributor's invoice price plus a specified percentage of that price as the fabricator's markup. To ensure that they receive competitive prices, end users generally require a pipe fabricator to solicit competitive bids for the pipe from three or more distributors. The end user then directs the fabricator to purchase pipe from one or more of the bidders. Pet. App. A3 n.5.

In this case, the pipe fabricator, Texas Pipe Bending Company (TPB), participated in a conspiracy with various specialty pipe distributors, including petitioner and five of petitioner's competing distributors, to eliminate competition on bids for the purchase of specialty pipe. Pet. App. A2-A3 & n.1. When TPB was awarded a fabrication job that provided for pipe to be purchased on a

cost-plus basis, TPB's purchasing agent would call Ronald Palma, a pipe distributor, and arrange for him to "quarterback" the job. Palma would then call other selected distributors, tell them that they would be receiving requests for quotations from TPB on a cost-plus job, and designate either a five, ten, or 15 percent kickback from the distributors to TPB. The distributors would then pad their bids accordingly, including markups for themselves. *Id.* at A4, A5.

As the "quarterback," Palma would discuss with the various distributors what items of pipe they wished to supply, designate a particular distributor as the low bidder on particular items, and ascertain the price the designated distributor would submit for the relevant item. Pet. App. A5, A10-A12 n.12. The other bidders would then "protect" that price by submitting higher bids. *Ibid.* The distributors knew that their bids were being submitted pursuant to cost-plus arrangements and that their inflated bids would be passed through TPB to the end users who ultimately decided which distributor would supply what item. *Id.* at A10-A15. Indeed, the distributors "took pains to make these bids look legitimate to the end users." *Id.* at A14.

Petitioner participated in the conspiracy through its President, Robert Cohn, and a vice-president, Saverio Rossetti, and through Palma, whom it hired in 1983 as an independent sales agent in an effort to procure more business. Palma would inform Cohn or Rossetti that a job was to be a "10 or 15 per cent job[ ]." Rossetti would then add that amount to petitioner's bid price and add an extra amount for petitioner. Pet. App. A12-A13 n.12. Palma would also tell Rossetti or Cohn to "protect" certain prices bid by petitioner's competitors, and they would comply. *Id.* at A13-A14 n.12. Petitioner's bids thus reflected the conspiratorial agreement and were not competitive bids. *Id.* at A14 n.12. Petitioner continued

to use Palma's services and engage in the price protection scheme even after it learned that Palma was bidding as a competitor for his own company, All Star Industries, Inc., on some of the same jobs for which he was serving as petitioner's sales representative. *Ibid.*

TPB and two distributors pleaded guilty, while petitioner, two other distributors, and three individuals (including Palma) pleaded not guilty and were convicted. The court of appeals affirmed the convictions. It rejected the defendants' claims that the trial court erred in instructing the jury that the acts charged by the government fell within the per se prohibition against price fixing by competitors. Pet. App. A6-A17. The court concluded that the conspiracy charged—one "among distributors to fix the price of specialty steel and pass that non-competitive price onto end users" (*id.* at A8)—was not subject to a "rule of reason" analysis. *Id.* at A6-A8.[1]

ARGUMENT

Petitioner contends that its conduct was not per se illegal price fixing, but rather "acceptable conduct between contracting parties." Pet. 10. According to petitioner, the conspiracy should be viewed as a "vertical distribution arrangement" with the pipe fabricator, TPB, in which petitioner "increased its prices on bids merely to capitulate to the demands of its customer," TPB. *Id.* at i, 10. The court of appeals correctly rejected petitioner's theory as unsupported by the evidence, and petitioner's factbound contentions to the contrary do not warrant further review.

[1] The court of appeals also rejected petitioner's claim that the trial court erred in failing to charge the jury that "good faith" and the lack of "specific intent" were defenses to the crime charged (Pet. App. A17-A23), and Mannesmann International Alloy's challenge to provisions of the fine (*id.* at A24-A29). Petitioner does not challenge the court of appeals' rulings on those issues.

As the court explained, petitioner participated in a scheme in which "distributors who were normally horizontal competitors conspired to rig their bids with the *explicit intention* of inflating the cost aspect of cost-plus contracts and deceiving specialty steel end users." Pet. App. A10 (emphasis in original); see *id.* at A9-A17. "Rather than merely being these distributors' customer who then went on to cheat its own customers, TPB was the distributors' conduit for passing their inflated, noncompetitive specialty steel bids onto unsuspecting end users." *Id.* at A16.[2]

Petitioner mistakenly contends (Pet. 12-14) that the decision of the court of appeals conflicts with the Third Circuit's decision in *Sitkin Smelting & Refining Co.* v. *FMC Corp.*, 575 F.2d 440, cert. denied, 439 U.S. 866 (1978). As the court of appeals recognized, *Sitkin* is "easily distinguishable." Pet. App. A9 n.10. *Sitkin* involved a secret agreement between a seller and one of the potential buyer-bidders to allow that bidder an opportunity to match the highest bid and win the contract. 575 F.2d at 445. The Third Circuit rejected the contention that the agreement was a per se violation of the Sherman Act, stating that "[t]he price-fixing within the scope of the per se prohibition of § 1 * * * is an agreement to fix the price to be charged in transactions with third parties, not between the contracting parties themselves." *Id.* at 446.

Unlike *Sitkin*, the agreements here did not fix prices merely "between the contracting parties themselves." 575 F.2d at 446. Petitioner participated in a conspiracy among *competitors* to rig bids. Pet. App. A12-A14 n.12.

[2] Petitioner's claim that it was merely acceding to the demands of TPB rather than agreeing to fix prices (Pet. 13-14) not only is inaccurate, Pet. App. A8-A17, but also is beside the point. Petitioner is not excused from the antitrust laws simply because others encouraged petitioner to participate in the price-fixing scheme.

Petitioner and its competing distributors fixed prices on specialty pipe and used TPB to submit those prices as competitive bids to third-party end users.[3] The end users were led to believe that the distributors' bids were the product of competition rather than collusion and were thereby victimized by the price-fixing arrangement. Thus, this case bears no similarity to *Sitkin*.

Petitioner also contends (Pet. 15-17) that the decision of the court of appeals conflicts with the Ninth Circuit's decisions in *Newman* v. *Universal Pictures*, 813 F.2d 1519 (1987), cert. denied, 486 U.S. 1059 (1988), and *Orion Pictures Distribution Corp.* v. *Syufy Enterprises*, 829 F.2d 946 (1987). In *Newman*, the court dismissed a complaint on the ground that the parties to a contract could not have suffered antitrust injury from a subsequent price-fixing conspiracy, see 813 F.2d at 1522-1523, while in *Orion* the court similarly held that the contracting party did not suffer antitrust injury from allegedly anticompetitive actions taken at a time when "competition was no longer a factor" in determining the parties' obligations to one another, 829 F.2d at 949. Those cases are inapposite here.

Unlike *Newman* and *Orion*, this case is not a private action seeking damages for money due under the terms of a private contract. The United States instituted this suit to vindicate the national policy embodied in the Sherman Act of free and open competition. The government did not claim that end users were entitled to certain prices for specialty steel because those prices were guaranteed by contract. Rather, the government claimed that petitioner's actions violated a federal

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[3] Although TPB facilitated the price-fixing scheme primarily by submitting the distributors' rigged bids to end users, it also sold pipe out of its own inventory and pretended to compete with petitioner and the other conspirators. Pet. App. A16 & n.15.

statute prohibiting bid rigging, regardless of whether petitioner had an independent contractual obligation to end users to submit competitive rather than rigged bids.

Furthermore, the injury suffered here bears no similarity to the alleged injury in *Newman* and *Orion*. Petitioner argues that, because the end users had selected TPB to supply pipe on a cost-plus basis, "competition was no longer a factor" at the time the bid rigging occurred. See Pet. 16. That is not so. The cost-plus contracts did not set the prices for pipe. Rather, they specified that prices would be determined through submission of competitive bids from pipe distributors. It was in the very midst of this supposedly competitive bidding process that petitioner conspired with other distributors to fix prices through submission of rigged bids. Thus, this case is clearly distinguishable from *Newman* and *Orion*.

Finally, contrary to petitioner's assertions (Pet. 19-22), the decision in this case is not inconsistent with *Business Electronics Corp.* v. *Sharp Electronics Corp.*, 485 U.S. 717 (1988), or any other decision of this Court. Petitioner contends that under *Sharp* the price-fixing agreement in this case is a "vertical" restraint that should have been judged under the "rule of reason" rather than the per se rule. Pet. 21. Petitioner mistakenly relies on a passage in *Sharp* stating:

> Restraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints.

485 U.S. at 730. As that passage indicates, petitioner's price-fixing agreement with competing distributors was a "horizontal" restraint. The fact that the horizontal restraint was facilitated by a pipe fabricator did not convert it into a vertical restraint. Application of the per se

rule was therefore appropriate.[4] Petitioner and the other distributors cannot avoid the per se prohibition on price fixing among competitors "simply because their conspiracy depended upon the participation of a 'middleman', even if that middleman conceptualized the conspiracy, orchestrated it by bringing the distributors together around contracts it held with its buyers, and collected most of the booty." Pet. App. A16.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4] *Sharp* held that an agreement between a manufacturer and a distributor that affected price, but did not fix prices, was not per se illegal. It did not alter the application of the per se rule against price fixing by competitors. Indeed, *Sharp* cited with approval earlier holdings in which the presence of a horizontal agreement as part of a vertical agreement justified application of the per se rule. 485 U.S. at 734-735 (citing *United States* v. *Parke, Davis & Co.*, 362 U.S. 29 (1960); *Klor's Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959)).

[5] Although petitioner suggests that "the *per se* rule should not be applied to restraints which have the potential to create efficiency" (Pet. 17-18), petitioner has failed to offer any credible procompetitive justification for the collusive bidding that took place in this case.